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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1929

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 45–53) is reported in 28 F. (2d) 725. The opinion of the District Court for the Eastern District of Virginia on final hearing is not reported but is found at pages 34–37 of the Record. No opinion was rendered by the District Court when it overruled the exception to the libel. (R. 11.)

JURISDICTION OF THIS COURT

The decree sought to be reviewed was entered October 19, 1928. (R. 55.) Petition for certiorari

was filed on January 15, 1929, and granted February 25, 1929. (R. 57.)

QUESTION PRESENTED

The ultimate question is whether the administrator of the estate of a deceased seaman who left no dependents is entitled to recover damages for his death caused by negligence of the officers in charge of the Government vessel on which he was working in Virginia or its unseaworthiness, in a case in which the accident and death occurred in 1926.

The question of law is whether the Virginia statute, giving a right of action in such a case even though deceased left no dependents, is superseded by the Act of Congress known as the "Jones Act" (Sec. 33, Merchant Marine Act, 1920, c. 250, 41 Stat. 988, 1007), which by incorporation of the provisions of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, limits recovery for the death of a seaman to cases in which he leaves certain specified relatives or dependents.

STATUTES INVOLVED

Section 33 of the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, 1007 (U. S. C. Title 46, Sec. 688), provides:

> That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> "SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain

an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. C. Title 45, Sec. 51), provides in Section 1:

That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of

the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

By Section 2 of the Act of April 5, 1910, c. 143, 36 Stat. 291 (U. S. C. Title 45, Sec. 59) the following section was added to the above Act:

SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

Section 5786 of the statutes of the State of Virginia (Code of 1924) provides:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed in rem

against said ship or vessel, or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

STATEMENT

Petitioner, as administrator, filed a libel under the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525 (U. S. C. Title 46, Sec. 741 et seq.), against the United States and a corporation owning a shipyard at Norfolk, Virginia, to recover damages for the death of his decedent. The libel does not elect to proceed upon principles of libels *in rem*, as provided by Section 3 of that Act, but in form and substance bases the claim upon principles of libels *in personam*. (R. 1–5.)

The libel alleges that the decedent was a seaman employed as third mate on the *Hybert*, owned by the United States, and that on October 5, 1926, while engaged in his duties as third mate, the vessel then being in dry dock of the Colonna's Shipyard, Inc., undergoing repairs, he was directed by the Chief Officer to secure the measurements of a

small ball and catch which belonged in the bottom of one of the lifeboats which at that time was swinging out on the vessel's davits and suspended over the dry dock. While decedent was attempting to crawl into the lifeboat, one end suddenly became released, causing the lifeboat to swing downward, throwing him to the bottom of the dry dock and instantly causing his death. The libel alleged that the accident was due to negligent fastening of the lines between the lifeboat and the davits, the negligent, careless, and improper manner in which the lifeboat was fastened to the same, and the careless, negligent, and wrongful manner in which the lifeboat was swung over the side of the steamship. (R. 2.) The sixth paragraph of the libel (R. 3) avers that the death was due to fault, negligence, wrongdoing or want of care of the respondents (both the shipyard and the Government), their officers, servants, and employees, in various specified particulars.

Negligence of the owner was based both on unseaworthiness in the equipment and on negligence on the part of the officers and crew of the vessel. (R. 3–5.)

The United States excepted to the libel on the ground that it failed to state a cause of action under Section 33 of the Merchant Marine Act of 1920 (the Jones Act) and that that Act furnished the exclusive remedy open to the libellant. (R. 10–11.) The exception was overruled without opinion. (R. 11.)

Answers were filed by both respondents. (R. 8, 12.)

On final hearing the District Court (Groner, J.) found that the installation of a device for fastening the line between the davit and the stern of the lifeboat was negligent because not installed in alignment or that a certain opening was not sufficiently large, that the device was unseaworthy, and that libellant was entitled to recovery against the United States. (R. 34–36.) A final decree ordering a recovery of $5,000 against the United States and dismissing the libel as to the corporation was entered. (R. 37–38.)

The District Court found that the decedent left surviving him no parent, child, brother, sister, or dependent, and this finding is not challenged. (R. 37.)

Upon appeal, the Circuit Court of Appeals for the Fourth Circuit unanimously reversed the decree on the only ground urged—that the Jones Act superseded the State statute and became the exclusive legislation applicable. (R. 46–53.)

In the Circuit Court of Appeals, counsel for all parties stipulated that no claim of error would be asserted against the defendant shipyard corporation (R. 44), and no question as to its liability is raised in this Court.

SUMMARY OF ARGUMENT

1. In the absence of legislation by Congress, the Virginia death statute would be applicable. Al-

though in the absence of statute, no suit to recover damages for the death of a human being may be maintained in admiralty, the admiralty courts have entertained libels *in personam* for damages for death given by a State statute where death has resulted from a maritime tort committed on navigable waters within the State.

2. The Jones Act brings into the maritime law new rules drawn from another system. It extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. It is comprehensive and exclusive, and a measure of general application. It provides a method under which relatives of a seaman killed by injuries for which his employer is responsible may obtain damages in an admiralty suit. In the instant case the decedent was a seaman who suffered "personal injuries in the course of his employment" within the meaning of the Act. The employment of the decedent and his relation to the owner of the vessel were maritime. The negligence to which his death was due was neglect in connection with a part of the equipment of the vessel, and the tort which caused his death was one which was subject to admiralty jurisdiction. The provisions of the Federal Employers' Liability Act, which the Jones Act incorporates by reference, cover the field of death due to negligence in "appliances * * * boats * * * or other equipment," and consequently cover the defect in the locking device on the lifeboat which caused the

decedent's death. The Jones Act comprehends the whole subject of liability of an employer for death of a seaman as a result of injuries occurring in the course of his employment and caused by a maritime tort, and consequently covers the field within which the instant case falls.

3. The Jones Act by generic reference incorporates the provisions of the Employers' Liability Act, which gives a right of action for death only if the decedent left certain specified relatives or dependents.

4. The power of Congress over maritime matters extends to the whole subject of maritime jurisdiction. As the power of Congress is paramount in the exercise of authority in reference to the maritime law, its statute (the Jones Act) must control and exclude all State legislation having application to the field which its statute covers. The fact that it provides for no recovery in certain situations in which the State death statute does provide for a recovery does not allow resort to the State statute, for there is but one wrongful invasion of the seaman's primary right of bodily safety, and the Federal statute provides when there shall be a recovery for that wrong.

5. The first clause of the Jones Act, which relates to injury not resulting in death, gives the seaman a right of election between compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness. No right of

election is given in the second clause of the Jones Act, which deals with death. Under the maritime law, no remedy for death existed and there is nothing in the Jones Act indicating an intention to allow a resort to State statutes.

6. Petitioner's motion for increase in the amount of award of damages should be denied if this Court should consider it.

ARGUMENT

I

IN THE ABSENCE OF LEGISLATION BY CONGRESS, THE VIRGINIA DEATH STATUTE WOULD BE APPLICABLE

As this Court said in *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240:

> It is established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law. At the common law no civil action lies for an injury resulting from death. The maritime law as generally accepted by maritime nations leaves the matter untouched and in practice each of them has applied the same rule for the sea which it maintains on land.

But this same case held that in the absence of legislation by Congress, where death results from maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the

damages sustained by those to whom such right is given.

The Virginia statute (copied on pp. 4–5, *supra*) gives such a right of action. The instant case was brought expressly under the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525. (R. 5.) If there had been no other Act of Congress applicable, the petitioner would, by virtue of the provisions of that Act, have had a cause of action against the United States.

II

THE JONES ACT COMPREHENDS THE WHOLE SUBJECT OF LIABILITY OF AN EMPLOYER FOR DEATH OF SEAMEN AS A RESULT OF INJURIES OCCURRING IN THE COURSE OF THEIR EMPLOYMENT WHERE THE TORT IS MARITIME, AND COVERS THE FIELD IN WHICH THE INSTANT CASE FALLS

The wording of the Jones Act (Sec. 33 of the Merchant Marine Act of 1920, pp. 2–3, *supra*) is so broad that it may well be characterized as "comprehensive and also exclusive" and as "a measure of general application." See *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 147. In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 388, 392, this Court held that it brought into the maritime law "new rules drawn from another system," that it "extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform."

It provides a method under which relatives of a seaman killed by injuries for which his employer is responsible may obtain damages in admiralty proceedings. *Northern Coal Co.* v. *Strand*, 278

U. S. 142, *supra*. It is exclusive of State compensation laws. *Ibid*, pp. 145, 146. And it has also been held that under the Act jurisdiction of the State courts is concurrent with that of the Federal courts. *Engel* v. *Davenport*, 271 U. S. 33.

The constitutionality of the Act was upheld in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, *supra*.

There can be no doubt that in the instant case, the decedent was a "seaman" who suffered "personal injury in the course of his employment," within the meaning of the Act. The libel alleges, and the facts as proved and found by the District Court show, that while he was engaged in his duties as third mate on the vessel, which was in dry dock, he was ordered by the Chief Officer of the vessel to go into a lifeboat which was swinging on the vessel's davits, and that because of the sudden release of one end of the lifeboat, he was thrown to the dry dock and instantly killed. (R. 2, 34.) Counsel for petitioner expressly admit that the decedent was a "seaman" and they applied to this Court under the Seamen's Act of July 1, 1918. (Brief in support of petition for writ of certiorari, p. 5.)

The employment of the decedent and his relation to the owner of the vessel were maritime. The negligence to which his death was due was neglect in connection with a part of the equipment of the vessel, and the "wrongful invasion of his primary right of bodily safety" occurred while he was working on the vessel. It has been held that a tort committed on a vessel while in a floating dry dock or

in an ordinary dry dock is subject to admiralty jurisdiction. *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171; *The Anglo-Patagonian,* 235 Fed. 92 (certiorari denied, 242 U. S. 636). See also *London Co.* v. *Industrial Commission,* 279 U. S. 109, in which the recent cases on admiralty jurisdiction over torts are abstracted and discussed.

The petitioner contends, however, that the decedent's death was caused by unseaworthiness of the vessel, and that "as there is no Federal death statute occupying *that field,* he [petitioner] can apply the death statute of the state in which the accident occurred." (Brief in support of petition for writ of certiorari, pp. 7–8, 13–14.) The District Court found that there was negligence, and did say that the locking device on the apparatus by which the life boat was suspended was unseaworthy. (R. 36.) But the Jones Act incorporated by reference the provisions of The Federal Employers' Liability Act (pp. 3–4, *supra*), which expressly apply to death of an employee from injury—

> resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, * * * boats, * * * or other equipment.

The defect in the device which caused the death of the decedent was a matter covered by the Jones Act. We consequently submit that the field within which the instant case falls is covered by the Fed-

eral statute, and that it provides a complete system for recovery for death of a seaman.

III

THE JONES ACT PROVIDES IN EFFECT THAT THERE SHALL BE NO RECOVERY FOR DEATH IN THE FIELD WHICH IT COVERS IF THE DECEDENT DID NOT LEAVE CERTAIN SPECIFIED RELATIVES OR DEPENDENTS

The Jones Act (pp. 2–3, *supra*) provides that in the action which it gives "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

In *Engel* v. *Davenport*, 271 U. S. 33, it was held that this generic reference incorporated in the Jones Act the provisions of the Employers' Liability Act (pp. 3–4, *supra*), which Act gives a right of action—

> in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parent; and, if none, then of the next of kin dependent upon such employee.

See also *Gulf, Colorado &c. Ry. Co.* v. *McGinnis*, 228 U. S. 173; *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, 256.

As the death in the instant case was instantaneous, there can be no recovery on the right of action given to an injured person (as distinguished from his relatives) which by virtue of Section 9 (p. 4, *supra*) survives his death. See *St. Louis & Iron Mountain Ry.* v. *Craft*, 237 U. S. 648, 655.

IV

THE JONES ACT PROVIDES THE EXCLUSIVE REMEDY FOR THE DEATH INVOLVED IN THE INSTANT CASE

As an original proposition, it might be urged that, as against the United States, The Federal Employees' Compensation Act, c. 458, 39 Stat. 742 (U. S. C. Title 5, Sec. 751 et seq.), provides the exclusive remedy. However, the Government in its exception to the libel took the position that the Jones Act furnished the exclusive remedy, and the Compensation Act apparently has not been mentioned in any phase of the proceedings. Moreover, if the Compensation Act is applicable, it would supersede the State statute for the same reasons which we urge for the exclusiveness of the remedy given by the Jones Act. If the Compensation Act is not applicable, the Jones Act is. Consequently we shall not consider the Compensation Act further.

The power of Congress over maritime matters extends to the whole subject of admiralty jurisdiction. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, *supra.* State statutes may be considered only in so far as they deal with subjects upon which Congress has not acted. The Jones Act, as construed by this Court, comprehensively embraces the whole subject of liability of an employer for death of seamen as a result of injuries in the course of their employment, at least where the tort is one of which admiralty has jurisdiction. (See pp. 11–13,

supra.) As the power of Congress is paramount in the exercise of authority in reference to the maritime law, its statute must control and exclude all State legislation having application to the field which its statute covers. *Engel* v. *Davenport,* 271 U. S. 33, 39, *supra; Northern Coal Co.* v. *Strand,* 278 U. S. 142, *supra.* To allow resort to the death statutes of the forty-eight States in situations in which they give greater or different rights than does the Jones Act would obviously destroy the uniform operation of that Act. As the States are unable to change the general features of the maritime law so as to defeat uniformity, their statutes should not be allowed to obstruct the uniformity in operation of a new Act of Congress in the field of the maritime law. See *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 241, *supra.*

The petitioner argues that as the Jones Act provides for no recovery in the case of the death of a seaman leaving no relatives of the kind designated in the Federal Employers' Liability Act and no dependents, there should still be a right to recovery under the Virginia statute. From the above discussion, however, it is clear that the Jones Act does provide in whose behalf a recovery can be had in the case of a death like that involved in the instant case. Where negligence causes such a death—at least if it is instantaneous—there is but a single wrongful invasion of a single primary right, regardless of the nature of the negligence or of any multiplication of grounds of negligence. See

Baltimore S. S. Co. v. *Phillips,* 274 U. S. 316, 321; *Pacific Co.* v. *Peterson,* 278 U. S. 130, 138. As the recent brief filed by the petitioner states, " there can be but one actionable wrong in any case." (P. 8.) The principle of exclusiveness of remedy must apply wherever a Federal statute prescribes rules for recovery in the case of the wrong involved. If a State statute could be resorted to in every case in which the remedy given by the Federal statute is not coextensive with that given by the State statute, the whole principle of exclusiveness of remedy would be futile and would be resolved merely to the empty proposition that where a Federal statute and the State statute are in all respects identical, the Federal statute should govern.

Situations similar to that in the case at bar have arisen under the Federal Employers' Liability Act itself. It has been held that as it fully covers the subject of the obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce, no room exists for State regulation even in respect to injuries occurring without fault, as to which the Federal Act provides no remedy, and that, therefore, an award made under a State Workmen's Compensation Act for such injuries can not be upheld. *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147. See also *Second Employers' Liability Cases,* 223 U. S. 1.

V

NO RIGHT OF ELECTION EXISTS BETWEEN THE REMEDY GIVEN BY THE JONES ACT AND THAT GIVEN BY THE VIRGINIA DEATH STATUTE

The first clause of the Jones Act gives the seaman a right of election. The language does not clearly show between what the election is given. This Court, however, said in *Pacific Co.* v. *Peterson*, 278 U. S. 130, 139, *supra:*

> the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness * * *.

No right of election is given in the second clause, which deals with death, and we submit that Congress did not intend to give any election for the simple reason that under the maritime law no remedy for death existed. There is nothing in the statute indicating any intention to allow a resort to State statutes. The absence of any such mention of State statutes in the Act is particularly significant in view of the fact that the same Congress in the "Death on the High Seas Act," c. 111, 41 Stat. 537 (U. S. C. Title 46, Sec. 761 et seq.), which was passed only a few weeks before the Jones Act, expressly provided in Section 7 that the provisions of any State death statute "shall not be affected by this Act." From the foregoing discus-

sion, it is clear that the operation of the State statutes for death was intended to be affected by the Jones Act.

VI

THE MOTION FOR INCREASE IN AMOUNT OF AWARD OF DAMAGES SHOULD BE DENIED

Counsel for petitioner have filed a motion in this Court for increase of damages from $5,000 to $10,000. The application for certiorari did not suggest that the award was inadequate. The sufficiency of the award is questioned for the first time in any court by the present motion.

The decedent was in his fiftieth year, and was earning $125 a month. (R. 37.)

If this Court should consider the motion, we submit that it should be denied.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals is sound and that its decree should be affirmed.

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